# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

THE PEP BOYS MANNY MOE & JACK OF CALIFORNIA

and

Case 31-CA-104178

**ROBERT NASH**, an Individual

Nikki Cheaney, Esq., Los Angeles, CA for the General Counsel Matthew Righetti, Esq., Righetti Glugoski, P.C., San Francisco, CA for the Charging Party Ross H. Friedman, Esq., Morgan Lewis & Bockius, LLP, Chicago, IL, for the Respondent

### **DECISION**

### Statement of the Case

**Gerald A. Wacknov, Administrative Law Judge:** This matter is based on a stipulated record. The initial charge in this matter was filed on April, 30, 2013. Since the submission of this matter to me on December 11, 2013, briefs have been received on January 28, 2014 from Counsel for the General Counsel (General Counsel), and counsel for the Respondent. Upon the stipulated record, and consideration of the briefs submitted, I make the following:

# **Findings of Fact**

### I. Jurisdiction

At all material times Respondent The Pep Boys Manny Moe & Jack of California has been a corporation with an office and place of business located in Inglewood, California, and has been engaged in operating retail auto parts stores. In the conduct of its business operations the Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives at its Inglewood, California facility products, goods and materials valued in excess of \$5,000 directly from points outside the State of California. It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act (Act).

## II. Alleged Unfair Labor Practices

### A. Issues

The principal issue in this proceeding is whether the Respondent has violated and is violating Section 8(a)(1) of the Act by maintaining a dispute resolution agreement, entitled Mutual Agreement to Arbitrate Clams (Agreement), requiring individual mandatory arbitration and precluding employees, including a former employee, the charging party herein, Robert Nash, from engaging in concerted activity by filing and participating in collective class actions.

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### B. Facts

The facts are not in dispute. The stipulation of facts entered into by the parties to this proceeding, together with the Agreement and other accompanying exhibits, in pertinent part, are as follows: Robert Nash, the Charging Party, is a former employee of the Respondent. Nash was required to sign the Agreement as a condition of employment with the Respondent. He did so on July 19, 2012. The Agreement by its terms requires employees to resolve all current and future employment-related disputes exclusively through individual arbitration proceedings. The Agreement provides that it should not be interpreted to restrict the filing of charges or complaints with the National Labor Relations Board or any other federal, state or local administrative agency. The Agreement provides that "This Agreement will survive the termination of Employee's employment with the Company as well as the termination of or expiration of any benefit of such employment."

# **Analysis and Conclusions**

*D.R. Horton, Inc.,* 357 NLRB No, 184 (2012) is the controlling Board decision in this matter. The Respondent maintains that *D. R Horton* was wrongly decided, and in its comprehensive brief significantly relies upon the recent Fifth Circuit decision which considers and discusses many of the arguments raised by the Respondent, which need not be reexamined herein, and denies enforcement of *D.R. Horton* in material respects. However, I am required to follow *D.R. Horton* unless reversed by the Supreme Court. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hosp.,* 244 NLRB 960, 962 fn. 4 (1979), enforced 640 F2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc.,* 342 NLRB 378, fn. 1(2004).

The Board determined in *D. R. Horton* that as a condition of employment "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." 357 NLRB No. 184, slip op. at p. 12 (2012). As the Agreement by its terms restricts employees, as a condition of their employment, from acting concertedly by pursuing arbitral and judicial litigation of employment claims, I find that it is facially unlawful.

The Respondent maintains the charge is time-barred by Section 10(b) of the Act, having been filed on April 30, 2013 more than six months after July 19, 2012, the date Nash signed the Agreement. Nash, as a former employee, nevertheless continues to be an employee within the meaning of the Act. *Little Rock Crate and Basket Company*, 227 NLRB 1406 (1977); *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984). Because the Agreement is facially invalid and, as noted, currently remains in effect and governs Nash's collective rights under the Act, it is clear that the charge is not time-barred. *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem.

<sup>&</sup>lt;sup>1</sup> D.R. Horton, Inc. v NLRB, 737 F.3d 344 (5<sup>th</sup> Cir. 2013).

961 F2d 1568 (3<sup>rd</sup> Cir. 1992); *The Guard Publishing Co.*, 351 NLRB 1110, 1110 fn.2 (2007). Cf. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960).

The Respondent maintains the Agreement is not unlawful because it specifically permits employees to file charges or complaints with other administrative agencies, specifically including the NLRB. The gravamen of the violation herein is the restriction of employee's rights, as a condition of employment, to engage in concerted activity by collectively pursuing litigation of employment claims in all forums arbitral and judicial. Here, the Respondent is attempting to circumscribe and limit those rights by permitting only individual arbitration of all claims and charges or complaints before administrative agencies. As the Board makes clear in *D.R. Horton*, the forums for collective action by employees may not be limited to the NLRB or other administrative agencies. I find the Respondent's argument to be without merit.

The Respondent maintains the Board did not have the authority to decide *D. R. Horton* due to the recess appointment issue regarding the composition of the Board. *See Noel Canning V. NLRB*, 705 F.3d 490, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). Moreover, the Respondent contends that the complaint is invalid as a result of the interim appointment of the Regional Director who issued the instant complaint. These matters are currently being considered in other forums. The Board has noted that until such matters are ultimately decided it shall continue to fulfill its responsibilities under the Act. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn. 1(March 13, 2013): *Universal Lubricants*, *LLC*, 359 NLRB No. 157, slip op. 1, fn. 1(July 16, 2013).

On the basis of the foregoing, I find the Respondent has violated and is violating Section 8(a)(1) of the Act as alleged.

### **Conclusions of Law and Recommendations**

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- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. The Respondent has violated Section 8(a) (1) of the Act as alleged.

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# The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix," at the locations where the Agreement has been in effect.

# ORDER<sup>2</sup>

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The Respondent, The Pep Boys Manny Moe and Jack of California, its officers, agents, successors, and assigns, shall:

<sup>&</sup>lt;sup>2</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

### 1. Cease and desist from:

- (a) Maintaining the Mutual Agreement to Arbitrate Claims that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act:
  - (a) Rescind or revise the Mutual Agreement to Arbitrate Claims that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.
  - (b) Advise all employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the Agreement has been rescinded or revised and that employees are no longer prohibited from bringing and participating in class action lawsuits against the Respondents.
  - (c) Within 14 days after service by the Region, post at all locations where notices to employees are customarily posted, and transmit to employees by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted and electronically transmitted to employees immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that the posted notices are not altered, defaced, or covered by any other material.
  - (d) Within 21 days after service by the Regional Office, file with the Regional Director for Region 31 sworn certifications of responsible officials on forms provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. March 7, 2014

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Gerald A. Wacknov Administrative Law Judge

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### **APPENDIX**

# NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection

WE WILL NOT maintain a mandatory arbitration agreement, known as the Mutual Agreement to Arbitrate Claims, that requires employees, including former employees, as a condition of employment, to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial regarding employment-related matters.

WE WILL rescind or revise the aforementioned arbitration agreement to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions.

WE WILL notify employees of the rescinded or revised agreement, and provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

			THE PEP BOYS MANNY MOE & JACK OF CALIFORNIA
5	5		(Employer)
Dated	By	<u>-</u>	<del></del>
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

# THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424